IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 721

RAYMOND N. SABOURIN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF PETITION

LOUIS J. CASTELLANO,
Attorney for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. .

RAYMOND N. SABOURIN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Raymond N. Sabourin, respectfully represents to the Court:

FIRST: That on the 31st day of October, 1946, the Circuit Court of Appeals, Second Circuit, unanimously affirmed a judgment of conviction and sentence entered upon a plea of guilty which had been entered in the District Court of the United States for the Eastern District of New York before Honorable Robert A. Inch, United States District Judge (fols. 28-29).

SECOND: The indictment filed on October 19, 1944, contained eight counts. Only Count One is reproduced in the record. Count One charges that defendant, during the calendar year 1935, received a net income of $13,891.63, upon

which he owed the United States a tax of $696.36, and that he did wilfully and unlawfully attempt to evade and defeat said tax, and as a means thereof did on April 12, 1939, make a false and fraudulent delinquent income tax return for said calendar year, in violation of the statute (fols. 12-20, pp. 4-7).

THIRD: Before the indictment came to trial, petitioner made an offer to compromise his civil and criminal liability which the Attorney General accepted pursuant to statutory authorization, 26 U. S. C. A. Sec. 3761. The agreement of compromise was embodied in a letter of the Attorney General, dated November 9, 1945, addressed to counsel for petitioner and reads as follows (fols. 33-34):

"Humes, Buck, Smith & Stowell,
50 Broadway,
New York 4, New York.

Attention: *Henry A. Mulcahy.*

In re: *United States* v. *Raymond N. Sabourin.*

Gentlemen:

This refers to your letter of September 12, 1945, addressed to the Attorney General, wherein you offered on behalf of your client, the defendant, to pay the sum of $27,100.04 and to enter a plea of guilty to Count One of the indictment in settlement of the matter. The money payment covers the defendant's liability for taxes, penalties and interest for the years 1935 to 1941, inclusive, and the plea is to be in discharge of the indictment.

We are pleased to advise you that the offer referred to has been accepted on behalf of the Attorney General, subject only to the condition that you execute a stipulation disposing of the case now pending in the Tax Court. The stipulation is in the hands of the United States Attorney.

Sincerely yours,

For the Attorney General,
(signed) SAMUEL O. CLARK, JR.,
Samuel O. Clark, Jr.,
Assistant Attorney General."

FOURTH: Petitioner made the money payment required by the compromise, executed the requested stipulation for disposition of the case pending in the Tax Court, and entered a plea of guilty to Count One of the indictment (fols. 8, 26, 28).

FIFTH: When petitioner entered his plea before the Court on January 2, 1946, his counsel submitted to the Court the compromise agreement and raised the question whether the Court had power to impose any additional punishment, penalty or sentence, by reason of the terms of the compromise agreement (fols. 26-27).

SIXTH: On Count One petitioner was sentenced to nine months' imprisonment and the other counts of the indictment were thereupon dismissed on motion of the United States Attorney (fol. 29).

SEVENTH: Petitioner's counsel immediately moved to set aside the sentence on the ground that the Court lacked power to impose sentence in view of the offer of compromise which had been accepted by the Attorney General. The motion was denied and petitioner took exception (fols. 30-31).

Questions Presented

The following questions which were argued in the Circuit Court of Appeals are presented for review by this Court:

(1) Whether the District Court had the power to impose a sentence after acceptance by the Attorney General of the offer of compromise.

(2) Whether the sentence imposed by the District Court subjected petitioner to punishment twice for the same offense, contrary to the Fifth Amendment of the Constitution of the United States.

For the sake of brevity the arguments addressed to the questions presented are omitted here but are fully developed in the brief.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. Sec. 347a).

Opinions Below

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals appears at the end of the record, and is printed here in Appendix B.

Reasons for Granting the Writ

The United States Circuit Court of Appeals, Second Circuit, in affirming the judgment of conviction of petitioner has decided:

(1) An important question of constitutional law in conflict with applicable decisions of this Court to the effect that no person shall be subject for the same offense to be twice put in jeopardy, or twice punished;

(2) A question of far reaching importance concerning the collection of Internal Revenue Taxes and the compromise of cases arising under the Internal Revenue Laws by the Attorney General;

(3) The opinion of the Circuit Court of Appeals construes the compromise agreement and the penalties therein provided, in conflict with applicable decisions of this Court;

(4) The Circuit Court of Appeals has decided a question of federal law which has not been but should be settled by this Court.

Statutes Involved

The statutes involved are set forth in Appendix A.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the Circuit Court of Appeals for the Second Circuit, directing that Court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings of said Court herein, being the case and entitled "United States of America, Appellee, vs. Raymond N. Sabourin, Appellant, case number 62, October Term 1946", decided October 31, 1946, and that judgment of said Court be reviewed by this Court and for such other relief as to this Court may seem proper.

Dated: November 18, 1946.

RAYMOND N. SABOURIN,
Petitioner.

LOUIS J. CASTELLANO,
Attorney for Petitioner.

Affidavit of Petitioner and Certificate of Counsel

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

RAYMOND N. SABOURIN, being duly sworn, says:

I am the petitioner herein. I have read the foregoing petition by me subscribed and know the contents thereof. The facts therein stated are true to the best of my knowledge, information and belief.

RAYMOND N. SABOURIN.

Sworn to before me the
18th day of November, 1946.

ETTA M. PETRIE,
Notary Public,
State of New York.
Residing in Queens Co.
Queens Co. Clk.'s No. 3161.
N. Y. Co. Clk's No. 598.
Comm. expires Mar. 30, 1948.

STATE OF NEW YORK, }
KINGS COUNTY, } ss.:

I hereby certify that I have examined the foregoing petition for a writ of certiorari and that in my opinion it is well founded and the cause is one in which the petition should be granted.

LOUIS J. CASTELLANO,
Attorney for Petitioner.

Dated, Brooklyn, New York, November 18, 1946.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. .

RAYMOND N. SABOURIN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. Sec. 347a).

Statement

On the 31st day of October, 1946, the Circuit Court of Appeals unanimously affirmed a judgment of conviction and sentence entered upon a plea of guilty which had been entered in the District Court of the United States for the Eastern District of New York before Honorable Robert A. Inch, United States District Judge (fols. 28-29).

The indictment, filed on October 19, 1944, contained eight counts. Petitioner, under the terms of his offer of compromise, entered a plea of guilty to the first count only, the other counts being dismissed upon motion of the Government. Petitioner was sentenced to imprisonment for nine months. Count One charges that petitioner, during the calendar year 1935, received a net income of $13,891.63, upon which he owed the United States a tax of $696.36, and that he did wilfully and unlawfully attempt to evade and defeat said tax, and as a means thereof did on April 12, 1939, make a false and fraudulent delinquent income tax return for said calendar year, in violation of the statute (fols. 12-20).

Petitioner made an offer to compromise his civil and criminal liability, including the matter charged in the indictment, pursuant to the terms of the compromise statute (26 U. S. C. A. Sec. 3761). The offer was accepted by the Attorney General on November 9, 1945. This agreement is set forth in paragraph Third of the petition.

The compromise relates to petitioner's civil and criminal liability arising under the income tax provisions of the Internal Revenue laws during the seven-year period 1935 to 1941 inclusive. Count One of the indictment under which petitioner was sentenced, alleges that a tax on his income was due for the calendar year 1935, and that he attempted to evade the payment of the tax through acts committed in 1939.

The agreement, covering such liability, including the subject matter of the indictment, provides for the compromise of all civil and criminal liability and pending proceedings, upon the following terms:

(1) Petitioner to pay $27,100.04 and to enter a plea of guilty to Count One of the indictment in settlement of the matter.

(2) The money payment covers petitioner's liability for taxes, penalties and interest for the years 1935 to 1941 inclusive, and

(3) The plea is to be in discharge of the indictment.

(4) The offer is accepted subject only to the condition that petitioner execute a stipulation disposing of the case pending in the Tax Court.

Petitioner complied with all the terms of the agreement prior to the imposition of sentence by (1) making the money payment provided for, (2) entering a plea of guilty to Count One of the indictment, and (3) executing the stipulation requested by the Attorney General, disposing of the case pending in the Tax Court (fols. 8, 26, 28).

When petitioner appeared before the Court on January 2, 1946, after the plea had been entered, his counsel submitted to the Court the compromise agreement set forth in the letter of the Attorney General, and raised the question whether the Trial Court had power to impose any additional punishment, penalty or sentence, by reason of the terms of the compromise agreement.

Both petitioner's counsel and the Assistant United States Attorney agreed that the compromise made no provision by its terms for any additional penalty to be inflicted upon petitioner, the Assistant United States Attorney stating that he took no position in the matter (fols. 27-28). We concede that statements made by either the United States Attorney or by counsel for petitioner would have no bearing on the issue, as the written agreement controlled the compromise and the question of penalties.

The Trial Court, with the agreement before it, took the view that petitioner had not even made a partial satisfaction of his criminal liability. The Court said:

> "Of course, the Court has not closed its eyes to the fact that the *civil end* has been satisfactorily discharged. I have taken all the facts into consideration in the imposition of sentence, but I am disposing of what is before me, a criminal case in which the defendant has pleaded guilty * * * " (fols. 28-29). (Emphasis supplied.)

Upon that basis the Court imposed a sentence of nine months' imprisonment on Count One of the indictment.

Petitioner immediately moved to set aside the sentence on the ground that the Court lacked power to impose sentence in view of the offer of compromise which had been accepted by the Attorney General. The motion was denied and petitioner took an exception (fols. 30-31).

Petitioner took an appeal to the Circuit Court of Appeals on January 3, 1946, and sought a reversal of the judgment of conviction upon the following grounds:

> "(1) The Court erred in imposing sentence.
>
> (2) The Court erred in denying petitioner's motion to set aside the sentence. The motion was based upon the offer of compromise which was accepted by the Attorney General pursuant to the statute, Title 26, U. S. C. A. Sec. 3671."

POINT I

The Trial Court was without power to impose an additional criminal penalty upon petitioner.

The Circuit Court of Appeals disposed of the case by holding "that the compromise must be construed to mean that the money payment settled the taxpayer's civil liability for taxes * * * and that the accused was to accept a sentence on Count One, if the other counts of the indictment were 'discharged' ". That construction, it is respectfully submitted, was reached only by reading into the agreement of compromise a good deal of language that is not expressly contained therein. Thus, the agreement does not say that the money payment is to cover only petitioner's "civil" liability. Nor does the agreement say that petitioner is "to accept a sentence" on Count One of the indictment as a condition of his discharge upon the other counts. The compromise between the parties, entered into pursuant to Section 3761 of Title 26, U. S. C. A., is, in essence, a con-

tract (*Nelson-Wiggen Piano Co.* v. *United States,* 84 F. 2d 47, 48). Questions of its validity and construction are to be determined according to the rules applicable to contracts generally (*Walker* v. *Alamo Foods Co.,* 16 F. 2d 694, 697). Words not actually employed by the contracting party are not to be read into a contract. Certainly, words are not to be read into a contract merely in order to spell out what the Court assumes to be the unexpressed intention of the parties. It is only the intent expresed or apparent in the writing that is given effect by the Courts (*Porter* v. *Commercial Cas. Ins. Co.,* 292 N. Y. 176, 183, 184; Williston on Contracts, rev. ed., Vol. 3, p. 1752).

It is agreed that the applicable statute authorized the Attorney General, after the tax case herein was referred to him for prosecution, to compromise both the civil and the criminal liability arising under the Internal Revenue laws. It is petitioner's contention that the agreement of compromise herein completely settled both his civil and criminal liability and was, in effect, a "judgment" completely disposing of the case and precluding the Bureau of Internal Revenue, the Attorney General and the Courts from imposing upon him any further judgment or penalty.

The agreement of compromise required petitioner to perform three specific conditions.

First of all, he was required "to pay the sum of $27,100.04". That payment was to cover his "liability for taxes, penalties and interest for the years 1935 to 1941, inclusive". The 1935 delinquency and the Criminal Act of 1939 was the subject of Count One of the indictment. Not a word is said about the possibility that the payment under the compromise is limited to petitioner's civil liability only. Furthermore, the word "penalty" is not, as commonly understood, limited to civil actions. For instance, it is defined by Webster (New International Dictionary, Second Unabridged Edition, p. 1808) as:

> "Penal retribution; punishment for crime or offense; the suffering in person, rights or property which is annexed by law or judicial decision to the commission of a crime or public offense * * *."

In that sense the word is commonly employed by the Federal Courts (*United States* v. *Reisinger,* 128 U. S. 398, 403; *Huntington* v. *Attrill,* 146 U. S. 657, 667; *United States* v. *LaFranca,* 282 U. S. 568; *Shick* v. *United States,* 195 U. S. 65; *Blum* v. *Widdicomb,* 90 F. 220, 221; *United States* v. *Jaffray,* 97 F. 2d 488, 494; *United States* v. *Mathews,* 23 F. 74, 75). And, quite to the point, is the ruling of this Court in *United States* v. *Chouteau,* 102 U. S. 603, 611, that that term comprehends criminal as well as civil liability when used with reference to the moneys paid by a taxpayer, pursuant to a compromise agreement, in satisfaction of a delinquency under the Internal Revenue laws. In the present case the requirements imposed upon petitioner by the terms of the compromise are a means of punishment (*United States* v. *Childs,* 266 U. S. 304). Thus the language used in the agreement of compromise is sufficiently broad to fairly include both the civil and the criminal liability asserted against the taxpayer.

Secondly, the agreement of compromise required petitioner "to enter a plea of guilty to Count One of the indictment". That plea was "to be in discharge of the indictment". The taxpayer is not informed that only seven out of the eight counts of the indictment are to be discharged. Nor is the petitioner informed under the agreement that he "was to accept a sentence on Count One".

Webster defines the word "discharge" to mean, inter alia, "to set at liberty; to release from confinement; to dismiss; to get rid of as a debt or duty by paying or performing; as, to discharge one's liabilities; acquittance; exoneration" (New International Dictionary, Second Unabridged Edition, p. 742). (See *Union Bank of Florida* v. *Powell's Heirs,* 3 Fla. 175, 193, 52 Am. Dec. 367; *Commonwealth* v. *Benson,* 94 Super. 10, 15.)

Moreover, the literal terms of the agreement required petitioner to do no more than admit his guilt in open court. A plea of guilty is a record admission of whatever is well alleged in the indictment (*People* v. *Earing,* 71 Misc. 615).

Standing alone, it is not a mere empty gesture because, unlike a nolle prosequi, it amounts to a conviction (*Kercheval* v. *United States,* 274 U. S. 220, 223) and would estop a taxpayer from denying his guilt of tax delinquency if sued in a subsequent civil proceeding (*Barnsdall Refining Corp.* v. *Birnamwood Oil Co.,* 32 F. Supp. 308, 312, quoting with approval from *State* v. *Burnett,* 174 N. C. 796, 93 S. E. 473, 474; *Twin Ports Oil Co.* v. *Pure Oil Co.,* 26 F. Supp. 366, 377, 378).

Thus all that the agreement required petitioner to do in this connection was to make a record admission of his guilt. Upon his doing so, the entire indictment of eight counts was to be discharged.

Thirdly, petitioner was to execute a stipulation disposing of the civil case then pending in the tax court. This he promptly did.

For his part, the Attorney General stipulated that the compromise was to be "in settlement of the matter". That is sweeping language to the effect that the entire case is to be closed upon petitioner's performance of the three above-mentioned conditions. No reservation is made, nor any indication given that any question will be left open to be disposed of by the criminal court.

Consequently, a taxpayer or counsel advising a taxpayer would, it is respectfully submitted, reasonably take the language used in the compromise agreement to be sufficiently broad to enable the taxpayer to make his peace with the Government without incurring any additional undetermined criminal liability.

In its brief in the Circuit Court of Appeals the Government argued that the plain language of the agreement should not be given effect by reason of two proposed rules of construction.

First, it was argued that one is presumed to intend the natural and probable consequences of his own acts and that, by offering to plead guilty, petitioner must be taken to have accepted a possible penal sentence from the Trial

Court. The rule invoked, of course, is one governing liability in matters of tort and crime. It has no bearing whatsoever on matters of contract where the rule is that one is liable for no more than he says he will be liable for. It petitioner on his part were to assert some claim or to attempt to litigate anew some matter involved in these 1935 to 1941 transactions, the Attorney General would be quick to remind the Court that petitioner's bargain with the Government prevented him from any further agitation of the matter. So far as he is concerned the compromise completely put an end to any claim which he might have had against the Government in connection with these transactions (*United States* v. *LaFranca,* 282 U. S. 568, 575; *Ely & Walker Dry Good Co.* v. *United States,* 8th Cir., 34 F. 2d 429; *Walker* v. *Alamo Foods Co.,* 5th Cir., 16 F. 2d 694).

Secondly, the Government contended in the Circuit Court of Appeals that petitioner's construction of the compromise would render it illegal as being designed to dictate the action of the Trial Judge. The Government's brief stated:

> "Moreover, to imply in the defendant's favor a promise of immunity would be to imply an illegal act, which the law will not condone and, *a fortiori,* will not presume."

The Government's construction of the agreement of compromise, it was urged, avoids that difficulty.

The problem, however, is quite unreal. A promise of immunity is of the essence of a compromise. "Compromise" is a legal term of precise meaning. In *Longridge* v. *Dorvalle,* 5 Barn. & Ald. 117, 7 Eng. Common Law Reports, 74, the leading case that established the validity of such agreements in the Law of Contracts, it was held that the consideration furnished on the part of the prosecutor of a claim who enters into such an agreement is the giving up of his right to sue. Thus, forbearance from the use of available legal remedies on the prosecutor's part is of the essence of the term "compromise" (*Union Bank* v. *Geary,*

30 U. S. (5 Peters) 99; 1 *Williston on Contracts* (Rev. Ed.), Section 135). Because a "compromise" includes a promise on the part of the prosecuting party, made on his own responsibility, to forego his remedies in the Courts, such bargains between criminal offenders and public officers are, in the absence of statute, considered illegal (*Wight* v. *Windskopf,* 43 Wis. 344; *State* v. *Keep,* 85 Ore. 265, 166 P. 936; *State* v. *Lopez,* 19 Mo. 254; *People* v. *Groves,* 63 Cal. App. 709, 219 P. 1033; *Golden* v. *State,* 49 Ind. 424; *State* v. *Miller,* 100 Mo. 606; 13 S. W. 852; 6 *Williston on Contracts* (Rev. Ed.), Section 1718).

The Circuit Court of Appeals did not adopt either of the foregoing arguments as advanced by the Government. Instead, it relied upon a statement quoted from *Burr* v. *United States,* 86 F. 2d 502, 504, cert. den. 300 U. S. 664, which reads as follows:

> "The court could not close the case with a plea of guilty dangling in the air."

In the *Burr* case the Court's opinion contains language to the effect that, under circumstances there appearing, the Trial Court was required to take appropriate action upon the taxpayer's plea of guilty, and had both the power and the duty either to impose sentence, or to suspend imposition or execution of sentence under the Probation Act. This language, it should be observed, was mere obiter dictum because the taxpayer's appeal from the sentence entered upon his plea had not been taken in time. The Circuit Court, therefore, had no jurisdiction of the appeal, and that appeal was, in consequence, dismissed. His petition for a writ of certiorari was subsequently denied. The only appeal of Burr properly before the Appellate Court was another appeal from an order denying his petition to suspend sentence. And that appeal, as the opinion states (p. 503 of 86 F. 2d), presented only the narrow question whether the Trial Court had abused its discretion in refusing to suspend sentence. Here, also, Burr applied for a

writ of certiorari, and such petition was denied. It is clear, then, that the question of the Trial Court's *power* to impose any sentence was not presented and could not be authoritatively decided in that case.

Furthermore, the terms of the compromise agreement in the *Burr* case differ from those in the case at bar. It appears from the *Burr* opinion, page 503, that the asserted compromise, apparently not a part of the record, provided for the entry of a plea of guilty, and the payment of a flat sum without making any reference to penalties. In the case at bar our compromise is part of the record, and provides that the money payment includes "penalties", and the plea of guilty "is to be in discharge of the indictment". Our contract was before the Court and the record shows it to be a valid contract of compromise. The *Burr* compromise agreement was not before the Trial Court. The opinion, at page 504, states: "whether or not a valid contract of compromise had been entered into was not even before the (Trial) Court."

Moreover, the inaccuracy of the statement quoted from the *Burr* case by the Circuit Court of Appeals is demonstrated by the fact that a plea of guilty entered pursuant to the agreement of compromise at bar differs essentially from one entered without such prior arrangement with the Attorney General. Mr. Justice Butler, writing for the Court in *Kercheval* v. *United States,* 274 U. S. 220, 223, said:

> "Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences. When one so pleads he may be held bound. *United States* v. *Bayaud,* 23 F. 271. But on timely application, the court will vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear or inadvertence."

It seems evident, however, that when a taxpayer has entered a plea of guilty pursuant to a compromise agreement,

he cannot thereafter invoke the discretion of the Trial Judge for leave to withdraw it. The plea of guilty is part of his contract with the Attorney General. The taxpayer cannot avoid that agreement, in whole or in part, except by invoking the legal principles governing rescision of contracts. This observation demonstrates the essential difference between the ordinary plea of guilty and one entered pursuant to our compromise agreement. The plea of guilty herein, therefore, has different characteristics and is governed by different principles than the ordinary plea of guilty, viz., the principles of contract law rather than those of criminal law.

That the statement in the *Burr* case is not conclusive when applied to the case at bar was admitted even by the Circuit Court of Appeals itself in its opinion herein. The Court below said:

> "Had the indictment contained but one count relating to a single tax year, or if its eight counts were merely different ways of stating the same crime, there might be some reason to think that the plea meant only a confession."

That, however, is not a valid distinction. Although there were eight counts in the indictment against petitioner, his plea was to be in discharge of the entire indictment and the money payment to cover all taxes and penalties. What difference does it make whether the indictment contained one or eight counts if the Circuit Court of Appeals was in error in holding that petitioner's plea of guilty was to discharge only seven out of the eight counts of the indictment?

There is in fact no substance at all to the argument that a plea of guilty, entered pursuant to the compromise agreement here, must necessarily be taken to be more than a record admission of guilt simply in order to have a final determination of the case. That objection is answered by the fact that the compromise agreement itself is in the nature of a consent decree. See *Barnsdall Refining Corp.*

v. *Birnamwood Oil Co.*, 32 F. Supp. 308, 311. The principle of res judicata is applicable, therefore, though criminal liability is involved (*United States* v. *Oppenheimer*, 242 U. S. 85, 87; *Frank* v. *Mangum*, 237 U. S. 309, 333, 334; *Collins* v. *Loisel*, 262 U. S. 426, 430). A consent decree "has the same force and effect as any other judgment and, in the absence of fraud or mistake, is valid and binding as such between the parties thereto and their privies. So far as it goes it stands as a final disposition of the rights of the parties thereto" (*Utah Power & Light Co.* v. *United States*, 42 F. 2d 304, 308).

The compromise agreement by its terms provides that the taxpayer shall do no more than make a money payment for taxes, penalties and interest, execute a stipulation and enter a record admission of his guilt. There is no reason either of construction or of public policy requiring that the agreement be given any other effect than that which its language plainly calls for.

POINT II

The sentence imposed by the Court subjected defendant to punishment twice for the same offense, contrary to the Fifth Amendment, and is void.

Having construed the compromise agreement as it did, the Circuit Court of Appeals had no difficulty in disposing of this point. It said:

> "With the agreement so construed, there can be no question as to the court's power to impose the prison sentence."

If, on the other hand, petitioner's construction of the compromise agreement is correct, then a serious constitutional question is presented. The compromise made under the statute while both civil and criminal proceedings were pending, terminated all civil and criminal liability of peti-

tioner, who gave full and complete satisfaction for his acts in accordance with the judgment of the officer having power under the statute to terminate the controversy arising under the Internal Revenue Laws. The agreement, in effect, was a final judgment entered on consent. It was satisfied in full, and the issues involved could no longer be litigated by either party.

Nevertheless, an additional penalty of nine months' imprisonment was imposed by the Court. The result was a violation of the double jeopardy provision of the Fifth Amendment of the Constitution of the United States. That amendment provides, in part:

> "* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * *."

It has been authoritatively established by decisions of this Court that the money payment for taxes and penalties exacted of a defendant pursuant to a compromise agreement is a criminal penalty within the meaning of the double jeopardy provision of the Constitution and operates as a complete bar to subsequent criminal prosecution and punishment (*United States* v. *Chouteau*, 102 U. S. 603, 611; see *Rau* v. *United States*, 2nd Cir., 260 F. 131, 134; *Willingham* v. *United States*, 5th Cir., 208 F. 137).

In *United States* v. *Chouteau*, supra, an action upon a distiller's bond, a compromise was considered, in effect, as a judgment in the criminal proceeding. The opinion of the Court, page 611, states:

> "Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. The term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution. The compromise pleaded must operate for the protection of the distiller against subsequent proceedings as fully as a former conviction or acquittal. He has been punished in the amount paid

> upon the settlement for the offense with which he was charged, and that should end the present action, according to the principle on which a former acquittal or conviction may be invoked to protect against a second punishment for the same offense. To hold otherwise would be to sacrifice a great principle to the mere form of procedure, and to render settlements with the government delusive and useless.
>
> Whilst there has been no conviction or judgment in the criminal proceedings against the distiller here, the compromise must on principle have the same effect."

The use of the term "jeopardy", in the cited cases is not to be taken in a merely figurative or analogous sense because the term is always used with reference to instances of criminal liability (*United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 548, 549). An agreement of the sort in question results in a bar to subsequent criminal prosecution.

One application of the double jeopardy principle is that a single offense cannot be punished by more than one penalty (*Ex parte Lange*, 85 U. S. (18 Wall.) 163, 175; *In re Bradley*, 318 U. S. 50, 52; *Bens* v. *United States*, 2nd Cir., 266 F. 152, 159, cert. den. 254 U. S. 634). (Compare the authorities holding that a single offense may not be split up and prosecuted as separate offenses: *Braverman* v. *United States*, 317 U. S. 49; *In re Snow*, 120 U. S. 274, 284; *People* v. *Stephens*, 79 Col. 428; *State* v. *Benham*, 7 Conn. 414; *State* v. *Smith*, 43 Va. 324.) This principle, applicable to all statutory offenses, was thus expressed by Lord Mansfield in *Crepps* v. *Durden*, Cowper 640:

> "If the act of Parliament gives authority to levy but one penalty, there is an end of the question; for there is no penalty at common law."

By his plea of guilty petitioner did not necessarily consent to the sentence imposed by the Court (*Twin Ports Oil Co.* v. *Pure Oil Co.*, 26 F. Supp. 366, 371). At any rate a violation of the constitutional inhibition against imposing a second penalty for a single offense renders the judg-

ment of conviction subject to collateral attack in a habeas corpus proceeding (*Hans Nielsen, Petitioner,* 131 U. S. 176, 185; *Ex parte Lange,* 85 U. S. (18 Wall.) 163, 175; *Bens* v. *United States,* 2nd Cir., 266 F. 152, 159, cert. den. 254 U. S. 634; cf. *Hollandsworth* v. *United States,* 4th Cir., 34 F. 2d 423, 425; *Gillespie* v. *Walker,* 4th Cir., 296 F. 330). In the light of the foregoing authorities it would seem to make no difference if a defendant should consent to, or should agree to undergo, an additional penalty for a single offense. Despite any such consent on his part the objection could nevertheless be raised in a subsequent proceeding by way of a collateral attack on the judgment of conviction. For, if the objection could be waived at all, such a waiver would surely be implied from a defendant's failure to take an appeal from the judgment of conviction. We are here dealing with a fundamental constitutional right. In 1 *Cooley on Constitutional Limitations* (8th Ed.), at page 371, the author says:

> "In criminal cases, the doctrine that a constitutional privilege may be waived must be true to a very limited extent. A party may consent to waive rights of property but the trial and punishment of public offenses are not within the province of individual consent or agreement."

Even with regard to such procedural rights as those to a trial by a common law jury and to the benefit of the advice of counsel, this Court has ruled that the Courts must indulge every presumption against waiver of fundamental constitutional rights (*Johnson* v. *Zerbst,* 304 U. S. 458, 464; *Aetna Ins. Co.* v. *Kennedy,* 301 U. S. 389, 393).

The doctrine of waiver is likewise inapplicable where the principle of double jeopardy is involved because, as the *Lange* and *Nielsen* cases (cited supra) hold, the Courts are without power to impose two penalties for one crime.

The Attorney General's power under the statute permits a compromise under such conditions, and upon any terms

suitable to him. He may compromise all civil and criminal liability regardless of the status of any civil or criminal proceeding based on such liability pending at the time. He may compromise both civil and criminal liability without exacting any penalty whatsoever. If he deems it advisable to compromise on the basis here, on the payment of money for taxes, penalties and interest, and a plea of guilty to Count One, the plea to be in discharge of the indictment, such compromise terminates the entire controversy, and the Court is without power to modify the contract by the imposition of an additional penalty.

As it appears that petitioner gave full satisfaction by his compliance with the agreement, which in effect was the "judgment" agreed upon between petitioner and the Executive Department, the power of the Court was at an end. The sentence thereafter imposed under the indictment was contrary to law.

This Court, in *In re Bradley,* 318 U. S. 50, 52, recently ruled that the Court's power was at an end when the petitioner had complied with the portion of a sentence which could lawfully have been imposed. There, the Court had erroneously imposed a sentence of both fine and imprisonment for contempt when, in fact, it had power only to impose a sentence of either fine or imprisonment. After the prisoner had paid the fine to the Clerk the Court vacated the erroneous sentence and imposed one of imprisonment only. The prisoner did not appeal but sought relief in a babeas corpus proceeding. This Court holding that he was entitled to be released from imprisonment, said at page 52 of 318 U. S.:

> "When, on October 1, the fine was paid to the Clerk and receipted for by him the petitioner had complied with the portion of the sentence which could lawfully have been imposed. As the judgment of the court was thus executed so as to be a full satisfaction of one of the alternative penalties of the law, the power of the court was at an end."

Petitioner's compliance here with the compromise lawfully made terminated the Court's power in the criminal proceeding by reason of the terms of the agreement.

That no further penalty was to be imposed in the criminal proceeding here is apparent from the terms of the agreement which provided for the penalties to be paid by petitioner. The Attorney General made his position clear on this question when he stated that the plea to Count One is to be in discharge of the indictment. In other cases of record, including the *Burr* case, supra, we find compromises, the terms of which provide for a plea of guilty without any reference to the plea being in discharge of the indictment. Here, it appears that the Attorney General was satisfied to terminate the controversy by a money payment for all taxes and penalties, and the parties agreed on steps to be taken in the civil and criminal cases then pending. A stipulation was to be executed in the civil case, and a plea was to be entered in the criminal case, such plea, however, to be in discharge of the criminal case. Neither of such steps indicates any intent of the parties to permit an additional penalty to be imposed by the Court.

The penalties here were agreed upon. They were paid under a compromise which has the same effect as a judgment in a criminal case (*Chouteau* v. *U. S.*, supra). There was strict compliance with such "judgment" or compromise by petitioner which resulted in his release from any further civil or criminal liability, and a discharge of the defendant with the same effect as a verdict by a jury (*Oliver* v. *U. S.*, 4th Cir., 267 Fed. 544, 548; *Rau* v. *U. S.*, 2nd Cir., 260 Fed. 131, 133). Upon such compliance the double jeopardy principle became operative to protect him from a second penalty for the same offense.

Under authority of the statute the Attorney General agreed to terminate the controversy between the Government and the petitioner. The money payment included taxes and penalties for the years 1935 to 1941. Count

One charges that a tax of $696.36 was due for the year 1935, and that petitioner attempted to evade the payment thereof through his unlawful acts committed in 1939. The entire charge in Count One was included in the compromise which covered a seven-year period. Both this civil and criminal liability was the subject of the compromise.

The plea of guilty entered to Count One of the indictment did not permit a modification of or increase in the penalties provided for under the contract. The Attorney General had power to compromise under any terms he deemed advisable. He was satisfied with the money payment including penalties agreed upon, and the admission in open court that petitioner committed the offense. The payment and the plea terminated the matter. The record before the trial court shows that the plea of guilty was entered pursuant to a contract of settlement in a case arising under the Internal Revenue Laws. There is no doubt that the Attorney General has power to make a compromise on terms which deprive the Courts of further power in pending proceedings. Petitioner's plea of guilty was not one in the ordinary sense which is required to be followed by a judgment and sentence. The plea here was an admission pursuant to contract, and the trial court was without power to increase the penalties provided for by the contract.

In conclusion we urge that the opinion of the Circuit Court in the instant case is in direct conflict with the decision of this Court in *United States* v. *Chouteau,* supra, wherein the Court said at page 611:

> "The Government through its appropriate officers, has indicated, under the authority of an Act of Congress, the punishment with which it will be satisfied. The offending party has responded to the indication and satisfied the Government. It would, therefore, be at variance with right and justice to exact in a new form of action the same penalty. For, as it was justly said by this Court in Ex parte Lange, speaking through

> Mr. Justice Miller, 'If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense.' "

Petitioner's sentence of nine months imposed by the trial court constituted a second punishment, for the same offense was contrary to law and void.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for the writ should be granted as the fundamental questions involved in this application are of sufficient importance to require the exercise of this Court's supervisory jurisdiction by a writ of certiorari.

Respectfully submitted,

LOUIS J. CASTELLANO,
Attorney for Petitioner.

Brooklyn, New York,
November 18, 1946.

APPENDIX A

Statutes Involved

Section 145-b of Title 26, U. S. C. A., reads as follows:

> "(b) FAILURE TO COLLECT AND PAY OVER TAX, OR ATTEMPT TO DEFEAT OR EVADE TAX. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Section 3761 of Title 26, U. S. C. A., reads in part as follows:

> "COMPROMISES
>
> (a) AUTHORIZATION. The Commissioner, with the approval of the Secretary, or of the Under Secretary of the Treasury or of an Assistant Secretary of the Treasury, may compromise any civil or criminal case arising under the Internal Revenue Laws prior to reference to the Department of Justice for prosecution or defense: and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense."

APPENDIX B

Opinion of United States Circuit Court of Appeals, Second Circuit

Before: L. HAND, SWAN and FRANK, *Circuit Judges.*

Appeal from the District Court of the United States for the Eastern District of New York.

The defendant has appealed from a judgment of conviction and sentence entered upon his plea of guilty to a charge of attempting to evade and defeat his income tax for the year 1935, contrary to section 145 (b) of the Internal Revenue Code, 26 USCA, § 145 (b).

LOUIS J. CASTELLANO, Attorney for appellant.

J. VINCENT KEOGH, United States Attorney (VINE H. SMITH and EDWARD S. SZUKELEWICZ, Assistant U. S. Attorneys), for appellee.

SWAN, *Circuit Judge:*

In October 1944 an indictment was filed against the defendant charging him with criminal liability under the income tax provisions of the Internal Revenue laws for the calendar years 1935 to 1941, inclusive.[1] Count One of the indictment alleged that an income tax of $696.36 was due from the defendant for the calendar year 1935 and that in April 1939 he wilfully attempted to evade and de-

[1] The indictment was in eight counts. Only Count One, which related to the 1935 tax, is reproduced in the record, but it was conceded upon the argument, and is fairly inferable from the compromise agreement hereafter set out, that each of the other tax years involved was covered by a separate count. The nature of the eighth count does not appear.

feat said tax by making a false and fraudulent delinquent tax return which showed no tax liability for said year 1935, in violation of section 145 (b) of the Internal Revenue Code, 26 USCA, § 143 (b). Before the indictment came to trial, the defendant made an offer to compromise his civil and criminal liability which the Attorney General accepted pursuant to statutory authorization, 26 USCA 3761. The agreement was embodied in a letter of the Attorney General, dated November 9, 1945, addressed to counsel for the defendant, and reading as follows:

"In re: United States v. Raymond No. Sabourin.

Gentlemen:

This refers to your letter of September 12, 1945, addressed to the Attorney General, wherein you offered on behalf of your client, the defendant, to pay the sum of $27,100.04 and to enter a plea of guilty to Count One of the indictment in settlement of the matter. The money payment covers the defendant's liability for taxes, penalties and interest for the years 1935 to 1941, inclusive, and the plea is to be in discharge of the indictment.

We are pleased to advise you that the offer referred to has been accepted on behalf of the Attorney General, subject only to the condition that you execute a stipulation disposing of the case now pending in the Tax Court. The stipulation is in the hands of the United States Attorney.

Sincerely yours,

For the Attorney General,

SAMUEL O. CLARK, JR.,
Assistant Attorney General."

Thereafter the defendant made the money payment required by the compromise, executed the requested stipulation for disposition of the case pending in the Tax Court, and entered a plea of guilty to Count One of the indictment. On Count One he was sentenced to nine months'

imprisonment and the other counts of the indictment were thereupon dismissed on motion of the United States Attorney. Before sentence was imposed and immediately thereafter by motion to set it aside, which the court denied, the defendant questioned the court's power to impose a sentence after acceptance by the Attorney General of the offer of compromise. The appeal presents the same contention. The defendant was released on bail pending appeal.

The appellant argues that the compromise agreement should be construed to mean that the payment of $27,100.04 settled his liabilities—criminal as well as civil—for taxes, interest and "penalties," and that his "plea" was to be merely an admission of guilt without the judicial consequences which normally follow a plea of guilty. Had the indictment contained but one count relating to a single tax year, or if its eight counts were merely different ways of stating the same crime, there might be some reason to think that the plea meant only a confession. But since the settlement covered seven tax years and it was conceded upon argument that each of the years was dealt with in a separate count of the indictment (i.e., each count dealt with a separate and distinct offense), we think it clear that the compromise must be *construed* to mean that the money payment settled the taxpayer's civil liability for taxes, interest and "additions to the tax" imposed by 26 USCA, § 293 (b), which the parties called "penalties," and that the accused was to accept a sentence on Count One, if the other counts of the indictment were "discharged." In other words, the defendant made his peace by paying up and pleading guilty to one crime out of seven.

With the agreement so construed, there can be no question as to the court's power to impose the prison sentence. The civil sanctions of § 293 (b) are distinct from the criminal sanctions of § 145 (b), and the invocation of one does not exclude resort to the other. *Spies* v. *United States,* 317 U. S. 492, 495; *Helvering* v. *Mitchell,* 303 U. S. 391, 399. A plea of guilty is more than an extra-judicial con-

fession; "it is itself a conviction." *Kercheval* v. *United States,* 274 U. S. 220, 223. Thereupon it becomes the duty of the court to impose sentence. Rules of Criminal Procedure, Rule 1, 18 USCA following § 688. As was said in *Burr* v. *United States,* 86 F. 2d 502, 504 (C. C. A. 7), cert. den. 300 U. S. 664: "The court could not close the case with a plea of guilty dangling in the air."

Judgment affirmed.

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724707—46

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 721

RAYMOND N. SABOURIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 20–22) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 31, 1946. (R. 23.) The petition for a writ of certiorari was filed on November 26, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTION PRESENTED

Whether the District Court had the authority or power to impose a sentence of imprisonment upon the petitioner after entry by him of a plea of guilty to the first count of the indictment.

STATUTES INVOLVED

Internal Revenue Code:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to collect and pay over tax, or attempt to defeat or evade tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution. (26 U. S. C. 145.)

SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.

* * * * *

(b) *Fraud.*—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such defi-

ciency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612 (d) (2). (26 U. S. C. 293.)

SEC. 3761. COMPROMISES.

(a) *Authorization.*—The Commissioner, with the approval of the Secretary, or of the Under Secretary of the Treasury, or of an Assistant Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense. (26 U. S. C. 3761.)

STATEMENT

The indictment in this case was filed on October 19, 1944 (R. 3), and contained eight counts. In the first seven counts of the indictment the petitioner was charged with having willfully attempted to defeat and evade his individual income taxes for each of the calendar years 1935 to 1941, inclusive. In the eighth count the charge was the making of a false statement within the purview of Section 35 (A) of the Criminal Code (18 U. S. C. 80).

In count one of the indictment the petitioner was charged with having filed a false and fraudulent delinquent income tax return for the calendar year 1935 on April 12, 1939, stating therein

that he had a net income of only $3,459.41 and that he owed no tax thereon. The indictment charges that, in truth and in fact, the petitioner had a net income for that year of $13,891.63 and owed a tax of $696.36 (R. 4–7).

After the return of the indictment the petitioner communicated with the Office of the Attorney General of the United States, offering to compromise his civil and criminal liability. On November 9, 1945, the offer of compromise was accepted on behalf of the Attorney General, pursuant to Section 3761, Internal Revenue Code (R. 11–12). Notice of acceptance of the offer was given to counsel for the petitioner by letter of November 9, 1945, from the Department of Justice, which embodied the terms of the settlement and which read as follows (R. 11–12):

> This refers to your letter of September 12, 1945, addressed to the Attorney General, wherein you offered on behalf of your client, the defendant, to pay the sum of $27,100.04 and to enter a plea of guilty to Count One of the indictment in settlement of the matter. The money payment covers the defendant's liability for taxes, penalties and interest for the years 1935 to 1941, inclusive, and the plea is to be in discharge of the indictment.
>
> We are pleased to advise you that the offer referred to has been accepted on behalf of the Attorney General, subject only to the condition that you execute a stipu-

> lation disposing of the case now pending in the Tax Court. The stipulation is in the hands of the United States Attorney.

In compliance with the terms of the settlement, the money payment having been made, the Tax Court proceeding dismissed, and the plea of guilty entered, the petitioner on January 2, 1946, appeared before the Honorable Robert A. Inch in the United States District Court for the Eastern District of New York. At that time the compromise agreement was brought to the court's attention. It was also pointed out by the Assistant United States Attorney that the plea was to be entirely unconditional. With this observation, counsel for the petitioner agreed. (R. 8–11.) The court then imposed a sentence of nine months' imprisonment under count one of the indictment (R. 12–13), and on motion of the Assistant United States Attorney, dismissed the remaining counts (R. 10).

An appeal was taken from the District Court's judgment to the Circuit Court of Appeals for the Second Circuit, wherein it was contended that the trial court, in view of the compromise, was without power to impose a criminal penalty upon the petitioner, and that the sentence imposed by the court subjected the petitioner to punishment twice for the same offense, contrary to the Fifth Amendment. The Circuit Court of Appeals affirmed the judgment of the District Court. (R. 23.)

ARGUMENT

The petitioner argues that the settlement as described in the Department's acceptance letter constituted a complete disposition of both his civil and criminal liabilities. He urges that the word "penalties" as used in the letter, was included therein as one penal sanction upon which another (the term of imprisonment) could not be superimposed without doing violence to the Fifth Amendment.

The construction placed by the petitioner on the Department's acceptance letter is entirely erroneous. It was a routine notice sent by the Department, pursuant to the regular practice, stating that the petitioner's obligations were discharged in part, and that the ordinary consequences should follow from the plea of guilty. If anything else had been intended or expected by either party, certainly the Government would have moved for a dismissal of the entire indictment, and the petitioner would not have entered an unconditional plea of guilty to count one. Moreover, no other kind of a plea of guilty would have been possible, since no prosecutor can assume the prerogative of the court to impose a proper sentence. The settlement did "dispose" of the indictment in so far as the prosecutor was concerned. The function of the prosecutor does not extend beyond the conviction, whether it be obtained by plea of guilty or by verdict. A plea of guilty is a conviction.

Kercheval v. *United States,* 274 U. S. 220. At that point the responsibility devolves upon the court. And a plea of guilty, such as this one, entered pursuant to a settlement, requires the imposition of sentence or the entry of judgment by the court. *Burr* v. *United States,* 86 F. 2d 502 (C. C. A. 7), certiorari denied, 300 U. S. 664; *United States* v. *La Fontaine,* 54 F. 2d 371, 373 (D. Md.).

The word "penalties" as used in the Department's acceptance was not intended to include the criminal penalty involved in count one of the indictment.[1] That term should be construed in the light of the entire sentence in which it appears. When so construed, it is plain that it was not intended to exonerate the petitioner from the criminal penalty involved in count one; otherwise, the plea of guilty would not have been exacted as a part of the petitioner's contribution to the settlement.[2] It would be absurd to assume

[1] The civil penalties which were included in the compromise settlement are not essentially criminal. *Helvering* v. *Mitchell*, 303 U. S. 391, 402. Consequently, the settlement of those penalties alone would not affect the petitioner's criminal liability.

[2] The petitioner's reliance on the case of *United States* v. *Chouteau*, 102 U. S. 603, is of no avail. There, the Government, without specific reservation, accepted from a distiller a money payment in compromise and settlement of "indictments and prosecutions", and in consequence of the settlement, dismissed the indictments. Thereafter, in a suit instituted by the Government against the distiller's surety to recover civil penalties on the same defaults, this Court held

that the Attorney General, when exacting from the petitioner a plea of guilty, intended to usurp the functions of the court by arrogating to himself the power to enter a nolle prosequi to count one of the indictment after the petitioner had entered a plea of guilty thereto in open court. Since the money settlement did not envisage the exaction of a penalty under count one, the sentence of imprisonment imposed by the court under that count could not constitute a second or double punishment in violation of the Fifth Amendment. Thus, the sentence by the trial court, imposed after a voluntary and unconditional plea of guilty, was eminently proper.

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that the terms of the compromise settlement included prosecutions for civil penalties. In the case at bar the Government made a specific reservation as to the criminal penalties involved in count one, and, far from abandoning the entire criminal liability, as it had the civil penalties in the *Chouteau* case, it insisted, while making the settlement, upon its right to exact a criminal penalty with respect to that count by expressly requiring the petitioner to enter a plea of guilty thereto. The *Chouteau* case is plainly not in point; nor is the decision of the court below in any respect in conflict with it.

CONCLUSION

The decision of the court below is correct, and there is no conflict of decisions. It is, therefore, respectfully submitted that the petition should be denied.

GEORGE T. WASHINGTON,
Acting Solicitor General.
SEWALL KEY,
Acting Assistant Attorney General.
J. LOUIS MONARCH,
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Special Assistants to the Attorney General.

DECEMBER 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946